SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000252-001 DT 07/14/2005

HONORABLE MARK R. SANTANA

CLERK OF THE COURT
K. Wendroff
Deputy

FILED:_____

ARTISTIC ENTERPRISES INC JIM Y WONG

v.

SHANNON SURFACE (001) FLORENCE BRUEMMER

GLENDALE JUSTICE COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

I. JURISDICTION

This court has jurisdiction pursuant to Article VI, Section 14 of the Arizona Constitution.

II. FACTS/PROCEDURAL HISTORY

Defendant Shannon Surface (Surface) entered into an agreement (the Agreement) with plaintiff Artistic Enterprises, Inc. dba Artistic Beauty Colleges (Artistic) to provide 1600 hours of instruction to Surface beginning February 4, 2002. Artistic, which operates several cosmetology schools, provides career preparation in cosmetology arts and science. Surface attended Artistic's cosmetology school (the School) located in Glendale, Arizona.

To fund her schooling, Surface paid cash and also obtained funding through Pell Grants and Federal Stafford loans for tuition and fees. Surface began to attend the cosmetology school on February 4, 2002. In May and July 2002, Surface took a ten day leave of absence approved by the School. In August, 2002, Surface took another approved leave of absence for surgery and recovery. Thereafter, Surface withdrew from the School. At the time Surface withdrew, she signed a Record of Transfer or Withdrawal certifying that she had attended a total of 460.48 hours at the school. At the time of her withdrawal, Surface had paid Artistic $4,012.61.

After Surface withdrew, she received at demand from Artistic for payment of an additional $3,118.39. Surface refused to pay the amount, taking the position that Artistic had been paid in full. Artistic brought suit against Surface for $4,997.01. Surface filed a timely answer. The matter was tried in the Glendale Justice Court on November 8, 2004.

At trial, Surface and Erica Whitehair, a representative of Artistic, testified. Whitehair indicated that the total cost of Surface's cosmetology program was $11,050.00 for 1600 hours of training. Whitehair also testified that the amount of tuition and fees charged was based on the percentage of time attended using a sliding scale set forth in the Agreement. Whitehair stated that the School's records indicated that Surface had attended 460.48 of the 1600 hours she had contracted to attend. According to Whitehair, this amounted to 28.7% of the contracted time. The 460.48 hours was based on a swipe card system that students used to clock in and out of class.

The Agreement's sliding scale provides that if a student has attended between 25% and 49.9% of the classes, 70% of the tuition and fees will be charged to the student. According to Whitehair, Surface owed Artistic an unpaid balance of $3,118.39. That amount, when combined with Surface's payments, represented 70% of $11,050., the amount the School was charging for class tuition and fees. Whitehair also claimed that Surface owed Artistic $965.51 in collection fees, interest in the amount of $674.01, legal fees of $95 and attorney fees of $25, for a total amount of $4,977.91.

During questioning by the trial court, Whitehair testified that the additional tuition and fee calculation was based on the "elapsed time" spent at school and the sliding scale. But she also indicated to the trial court that it was not how much time Surface spent in class, but her days of enrollment that counted in the calculation. During the trial court's examination, Whitehair admitted that Artistic started new classes every two weeks and was therefore able to mitigate its loss. Whitehair agreed with the trial court's conclusion that for a withdrawing student, the calculated amount can be punitive.

During questioning by the trial court concerning the collection fees, Whitehair conceded that the Agreement did not authorize Artistic to seek reimbursement for its collection efforts. Whitehair testified that the $965.51 amount represented 30% of the unpaid balance. Whitehair agreed with the trial court that the 30% calculation was determined by "reaching in the air and grabbling 30%" and that Artistic had not tracked its collection costs.

Surface testified that it was her understanding that she had paid for all of the classes which she had attended and that nothing was due and owing to Artistic. Until she received the Artistic demand in the mail, she was unaware that there any outstanding debt. She stated that the swipe card system, upon which Artistic had calculated the number of hours she had attended, was unreliable and that it would often not allow her to clock out. Surface testified that the School, which controlled the card swipe system, had overestimated her attending hours.

The trial court granted judgment to Surface on December 10, 2004. In its order, the trial court found Artistic had the right to be compensated for hours attended but that Artistic had been fully compensated for Surface's time. That court further determined that to charge an additional amount would unfairly penalize Surface because she had to withdraw due of illness. The trial

court decided that the Agreement, which did not contain a clause allowing a sick student to withdraw without a sanction, was unconscionable.

Artistic filed a timely appeal.

In its appeal, Artistic argues that (1) there was a contract between the parties; (2) Surface attended more than twenty five percent of the total number of hours she contracted to attend; (3) the contract was neither ambiguous nor unconscionable.

III. ANALYSIS

A. Standard of Review

Artistic incorrectly argues that it is entitled to a trial de novo in this court. This court has appellate review jurisdiction over all appeals from municipal and justice of the peace courts. Arizona Const. Article VI, Section 14. A trial court's findings of fact are binding on an appellate court unless they are clearly erroneous or unsupported by any credible evidence. Wean Water, Inc. v. Sta-Rite Indus., Inc., 141 Ariz. 315, 686 P.2d 1285, 1286 (Ct. App. 1984). In reviewing the trial court's findings, an appellate court's duty begins and ends with inquiring whether the trial court had before it evidence reasonably supporting its action viewed in the light most favorable to sustaining the findings; an appellate court will not weigh conflicting evidence on appeal. Imperial Litho/Graphics v. M.J. Enters., 152 Ariz. 68, 72, 730 P.2d 245, 249 (Ct. App. 1986).

B. Was there a contract between the parties?

The preponderance of the evidence establishes that the Agreement was a contract between the two parties. The contract does provide for a sliding scale of payment, depending on the percentage of classes completed. The trial court's judgment does not suggest that the Agreement is not a contract.

C. Did Artistic prove that Surface attended more than twenty five percent of the total number of hours she contracted to attend at the school?

The focus of much of the trial concerned whether Surface had actually attended 28.7 % of the contracted time. The trial court's judgment does not specifically address this issue. The decision states that the Artistic was "compensated for the time the student attended" and that "adding a penalty" would be unconscionable. The judgment can be interpreted as finding that Surface did not attend more than twenty five percent of the time and that Artistic had been fully compensated. Is there credible evidence that would support this conclusion?

Although Surface signed a Record of Transfer or Withdrawal certifying that she had attended a total of 460.48 hours at the school, she provided uncontroverted trial testimony that

the school's swipe card system did not function properly and overestimated the hours she attended. The trial court could have found this testimony credible and persuasive. Moreover Artistic's damage claim was also undermined by: (a) Whitehair's inconsistent testimony on how the time was calculated (enrollment versus actual class time) (b) Artistic's claim for collection costs which was neither authorized by the contract nor based on any type of admissible evidence and (c) Whitehair's admission that Artistic could have mitigated its damages. Given this evidence, the trial court could reasonably have concluded that Artistic failed to prove that Surface attended the School 28.7% of the time, and that her attendance was 25% or less.

This Court finds that the record reasonably supports a finding that Artistic did not prove that Surface attended the School for than 25% of the contracted amount. Imperial Litho/Graphics v. M.J. Enters., supra.

In its brief, Artistic raises a number of arguments to demonstrate that either its calculation of Surface's time was accurate or that even if the swipe card system was inaccurate, the inaccuracy was insufficient to reduce Surface's attendance percentage below 25%. But these contentions, and the calculations on which they are based. were not presented to the trial court. They cannot be considered by this court. Gallegos v. Strickland, 121 Ariz. 160, 589 P.2d 34 (App. 1978).

D. Was the contract ambiguous or unconscionable?

Because this Court finds that Artistic did not prove that Surface attended the School 28.7 % of the time, this Court does not decide the issue of whether the contract was ambiguous or unconscionable.

E. Conclusion

The court concludes that judgment of the trial court should be affirmed.

F. Attorney's Fees

Surface has requests her attorney's fees and costs be awarded. This Court determines that the matter arises out of a contract pursuant to A.R.S. § 12-141.01 and that fees should be awarded. Surface is also entitled to any costs on appeal. Rule 13, Superior Court Rules of Appellate Procedure. Surface has also requested that the cost bond and supersedes bond be released to her. This will also be ordered.

IT IS ORDERED:

(1) Affirming the judgment of the trial court;
(2) Appellee's cost and supersedes bond are released to Appellee;
(3) Appellee's reasonable attorney's fees and costs will be awarded.

IT IS FURTHER ORDERED:

(1) Appellee will file an application for attorney's fees and costs by Friday, August 12, 2005;
(2) Appellant may file any response by Friday August 26, 2005.